



claimant told a co-employee she had suffered a back injury while cleaning out a storage shed a couple of days before her work-related injury. Respondent concludes the alleged non-industrial incident caused claimant's back complaints. Respondent, in the alternative, requested review of the issue of the nature and extent of disability.

Claimant argues the Administrative Law Judge's finding of accidental injury arising out of and in the course of employment should be affirmed but that the functional impairment should be increased to 12 percent.

Accordingly, the issues raised on review are whether the claimant's accidental injury arose out of and in the course of employment and the nature and extent of claimant's disability, if any.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Betty Ann Castleberry was hired as a sales associate on September 19, 2000, with the Roeland Park Wal-Mart. Claimant's duties were to assist customers in the jewelry department and stock shelves. On November 17, 2000, claimant was moving jewelry boxes and as she picked up a jewelry box off the floor it started to drop out of her hands. Claimant twisted her back to keep it from dropping and she felt a tear in her lower back with pain down her left leg. Claimant had trouble standing back up. This incident occurred approximately 7:15 p.m. during claimant's 1 p.m. to 10 p.m. shift.

Claimant went behind the counter and waited until Merry Baker, a co-employee, returned from break. Claimant told Ms. Baker what had happened. Ms. Baker then called the support manager who advised the claimant to go to the break room for a little while to wait and see if she felt any better. Later, the claimant was taken to Occupational Medicine Associates. Claimant testified she was given an injection, prescription for medication and was released to return to work.

Claimant did not work the following four days which included her normal two days off. She returned to work for a couple of days but was seen at the Bethany Medical Center Emergency department on November 23, 2000, for back complaints. X-rays were taken of her lumbar spine which revealed preexisting spondylitic changes but no evidence of fractures or other abnormalities. Claimant then was off work for a few more days. Claimant was prescribed physical therapy but it was denied by the insurance company because of the belief the claimant's injury was the result of a non-industrial accident.

Merry Baker, a co-employee who worked with claimant in the jewelry department, testified regarding a conversation she had with the claimant. The claimant had advised Ms. Baker that she had gone to a storage shed in Topeka, Kansas to clean it out when she twisted her back trying to grab a box to keep it from falling. This alleged incident had happened a couple of days before claimant's injury at work. Claimant denies she ever told anybody that she got hurt someplace else.

After claimant's work-related injury on November 17, 2000, Ms. Baker notified the store manager and told him about the conversation she had with claimant regarding the non-work-related incident cleaning out the storage shed. Ms. Baker further testified that about a week after the work-related accident, the claimant had asked Ms. Baker why she told anyone about the storage shed incident because the claimant was actually hurt at Wal-Mart.

Ms. Baker noted claimant apparently did not seek treatment for the storage shed incident, did not miss any work and did not have any problem performing her job duties. Claimant continued to work for respondent until the second week of January 2001. Claimant quit her job because her husband and daughter had health problems and she needed to provide care for them.

The claimant was examined by Edward J. Prostic, M.D., on January 12, 2001, at the request of her attorney. Dr. Prostic is board certified in orthopedic surgery. Upon examination, the claimant was complaining of pain across her low back at and below the waist with intermittent radiation to either knee. Claimant noted worsening with substantial sitting, standing, walking as well as bending, squatting, twisting, lifting, pushing or pulling and also inclement weather. The physical examination showed claimant had some tenderness at the lumbosacral junction, with moderate restriction of lumbar extension and lateral bend to each side. An x-ray was performed on the claimant's lumbar spine which revealed a mild disk space narrowing at multiple levels, limbus vertebra at L3 and significant degenerative changes in the upper lumbar levels.

Dr. Prostic diagnosed claimant with severe sprain and strain of her spine and she continues with mechanical low back pain. Dr. Prostic opined the claimant would need to continue the use of an anti-inflammatory medication with intermittent heat or ice with massage and therapeutic exercises. Dr. Prostic opined the claimant is unable to lift weights greater than 20 pounds occasionally, 10 pounds frequently or 5 pounds constantly and should avoid frequent bending or twisting at the waist, forceful pushing and pulling, more than minimal use of vibrating equipment and captive positioning.

Based upon the AMA Guides, Fourth Edition, Dr. Prostic rated the claimant with a 12 percent permanent partial impairment to the body as a whole on a functional basis due to her work-related injury. Dr. Prostic testified his 12 percent impairment rating was based upon 7 percent for degenerative disk disease with significant degenerative changes and the other 5 percent for loss of motion, flexion and lateral bend to each side. Dr. Prostic

opined the claimant's preexisting degenerative disease was made symptomatic by the trauma and rendered her degenerative area painful.

Claimant was examined by Michael J. Poppa, D.O. on February 28, 2001, at the request of respondent's attorney. Dr. Poppa is board certified in occupational and preventive medicine. Upon examination, the claimant was complaining her back limits her from sitting, standing or riding in a car for long periods of time. The claimant demonstrated sciatic nerve root irritation. Claimant had complaints of tenderness on palpation across her lower back in the L5-sacral area. Dr. Poppa testified the claimant's physical examination was unremarkable and demonstrated no evidence of any disk or nerve root involvement, but with remaining complaints involving her back and back pain.

Dr. Poppa opined the claimant's obesity and deconditioning probably contributed to her lower back pain complaints when performing range of motion. Dr. Poppa diagnosed the claimant as having a resolved soft tissue lumbar strain. Dr. Poppa opined the claimant is capable of performing her regular duties without restrictions. Based upon the AMA Guides, Fourth Edition, Dr. Poppa rated the claimant with no residual impairment of a permanent nature as a result of her resolved lumbar strain.

Because of the contradictory medical opinions the Administrative Law Judge ordered an independent medical examination of claimant be conducted by Dale E. Darnell, M.D., for the purpose of a functional impairment rating. In a report dated April 25, 2001, Dr. Darnell concluded claimant would fit the DRE Category equivalent to a 5 percent permanent partial impairment of the body as a whole.

To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."<sup>1</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.<sup>2</sup> Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.<sup>3</sup>

Respondent contends the Administrative Law Judge erred in finding claimant suffered an accidental injury arising out of and in the course of employment. Respondent argues the conversation claimant had with her co-employee establishes claimant had suffered a non-industrial injury while cleaning a storage shed. Accordingly, respondent concludes claimant is not credible and has not met her burden of proof that she suffered a work-related accident.

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<sup>1</sup>K.S.A. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

<sup>2</sup>Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

<sup>3</sup>Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

Initially, it should be noted claimant denied she told anyone she had been hurt prior to the accident at work. Claimant further testified that from the date she was employed with respondent until November 17, 2000, she was never hurt, never missed any scheduled days of work and did not seek any medical treatment for her back.

The claimant performed her job duties without any difficulty until the work-related incident on November 17, 2000. Claimant started her shift at 1 p.m. on that day and the work-related incident occurred at approximately 7:15 p.m. There is no evidence claimant was not able to perform her job duties, moreover, her co-employee agreed claimant was able to perform her duties until the work-related incident. After the work-related incident the claimant required medical treatment.

Lastly, Ms. Baker testified that she was not saying claimant did not have the accident at work for respondent and although she did not witness the incident, she agreed with claimant's testimony regarding the incident in all other respects.

The Board concludes the claimant has met her burden of proof to establish she suffered a work-related accident arising out of and in the course of her employment for respondent on November 17, 2000.

The claimant limited her request for compensation to her functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA Guides. At the time of claimant's injury, the Act required that functional impairment be based on the Fourth Edition of the AMA Guides.<sup>4</sup> The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>5</sup>

The Board agrees with the Administrative Law Judge that, in this instance, the opinion of the court ordered independent medical examiner, Dr. Darnell, is more persuasive. Accordingly, the Board adopts and affirms the Administrative Law Judge's determination claimant has suffered a 5 percent permanent partial functional impairment to the body as a whole.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated February 27, 2002, is affirmed.

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<sup>4</sup>K.S.A. 44-510e(a).

<sup>5</sup>Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
Matthew S. Weaver, Attorney for Respondent  
Steven J. Howard, Administrative Law Judge  
Director, Division of Workers Compensation